Regulations

In The Supreme Court of the United States

David Sebastian,
Petitioner,

v.

Attorney General of the United States,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The undersigned counsel, on behalf of David Sebastian, respectfully petitions for a writ of certiorari to review the adverse judgments of the United States Court of Appeals for the Eleventh Circuit.

Opinions Below

The Eleventh Circuit Court of Appeal's August 11, 2005, decision denying Sebastian-Soler's Petition for Rehearing *En Banc* of the Eleventh Circuit Court of Appeal's published opinion in *Sebastian-Soler v. U.S. Attorney General*, 409 F.3d 1280 (11th Cir. 2005) denying Sebastian-Soler's judicial petition for review pursuant to 8 U.S.C. §1252(b)(1). Appendix A.

The Eleventh Circuit Court of Appeal's May 19, 2005, published opinion denying the Petitioner's petition for review in *Sebastian-Soler v. U.S. Attorney General*, 409 F.3d 1280 (11th Cir. 2005). Appendix B.

The Executive Office of Immigration Review, Board of Immigration Appeal's, May 16, 2003,

administrative decision in In Re: Sebastian-Soler, (A18-229-818) (BIA, May 16, 2003). Appendix D.

The Executive Office of Immigration Review, Office of the Immigration Judge, Bradenton, Florida's January 8, 2003, administrative order of removal entered in *Matter of Sebastian-Soler*, ((A18-229-818) (EOIR-OIJ, January 8, 2003). Appendix E.

The Executive Office of Immigration Review, Office of the Immigration Judge, Bradenton, Florida's November 22, 2002, administrative order denying the Petitioners' motion to terminate removal proceedings based upon Sebastian-Soler's claim of United States citizenship and Sebastian-Soler's motion to reconsider, *Matter of Sebastian-Soler*, ((A18-229-818) (EOIR-OIJ, November 22, 2002). Appendix F.

Jurisdiction

The instant case arises from a petition for review in the Eleventh Circuit Court of Appeals from a final administrative order of the Board of Immigration Appeals ("Board) affirming the immigration judge's denial of the Petitioners' motion to terminate removal proceedings based upon Sebastian-Soler's claim of United States citizenship, ensuing motion to reconsider, and the immigration judge's ensuing order of removal all subjecting Sebastian-Soler to removal from the United States.

The Eleventh Circuit Court of Appeals' judgment denying the Petitioner's petition for review was entered on May 19, 2005.

Sebastian-Soler's Petition for Rehearing *En Banc* was denied on August 11, 2005.

The instant petition for writ of certiorari is therefore timely filed within 90 days of the Eleventh Circuit Court of Appeals' August 11, 2005, judgment

denying Sebastian-Soler's Petition for Rehearing *En Banc* the Court of Appeals. Supreme Court Rule 13.3.

WHEREFORE, the Supreme Court of the United States possesses jurisdiction to consider and determine the instant petition for writ of certiorari pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

(For Text of Statutes see Appendix H

Due Process Clause of the Fifth Amendment

Title 8 U.S.C. §1105a (repealed Pub.L. 104-208)

Title 8 U.S.C. §1252(b)(5)

8 U.S.C. §1421(e) (March 11, 1988 Ed.)

8 U.S.C. §1446(b) (1988)

8 U.S.C. §1447(a) (1988) provides:

8 U.S.C. §1447(b) (1988)

8 U.S.C. §1448 (1988)

8 U.S.C. §1449 (1988)

8 U.S.C. §1450(b) (1988) provides in part:

Section 408 of Pub.L. 101-649, as amended Pub. L. 102-232, Title III, § 305 (n), Dec. 12, 1991, 105 Stat. 1750, titled "Continuation of current rules (a)(2)(A)"

Factual and Procedural Statement

Petitioner, hereinafter "Sebastian-Soler," was born in Cuba on July 22, 1966. Sebastian-Soler lawfully entered the United States on February 3, 1969 as a parolee. On February 14, 1974, Sebastian-Soler's status was adjusted to Lawful Permanent Resident, as of March 23, 1969.

On April 29, 1987 Sebastian-Soler applied for naturalization by filing INS Form N-400, Application to file Petition for Naturalization. Sebastian-Soler resided at 750 West 23rd Street, Hialeah, FL 33010 when he filed his Application to file a Petition for Naturalization Sebastian-Soler. In December of 1987, Sebastian-Soler's address of residence changed to 1370 West 71st Street, Hialeah, FL 33014.

On February 2, 1988, INS Miami District Office sent Sebastian-Soler a notice to appear for a preliminary examination scheduled for March 11, 1988.

Sebastian-Soler appeared for such examination on March 11, 1988. As a member of the Jehovah's Witnesses, Sebastian-Soler took a modified oath of allegiance because of his religious convictions. On March 11, 1988 Sebastian-Soler fully executed INS Form N-405, Petition for Naturalization. After successful completion of the interview, Sebastian-Soler subscribed to a modified oath of allegiance in compliance with 8 U.S.C. §§1448(a)(1) – (4), and (5)(C), 1446(b) (1988) and 8 C.F.R. §337.1(a) (1988). Sebastian-Soler signed the front of INS Form N-405 and the reverse side containing the oath of allegiance. Sebastian-Soler also affirmed he would be willing to perform work of national importance under civilian direction when required by law.

On March 11, 1988, Sebastian-Soler filed his Petition for Naturalization with the Clerk of the U.S. District Court, S.D. Florida. [2] INS Form N-405 reflects

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[2] "[A]ny petition for naturalization which may be pending in a court on October 1, 1991, shall be heard and determined in accordance with

the "[o]ath" was "[a]dministered" by Designated Examiner (DE) Meryl Latinsky, n.k.a. Supervisory Adjudication Officer (SAO) Meryl Finnerty, on March 11, 1988. Sebastian-Soler's naturalization petition was continued for documentation consisting of an INS Form G-325, Biographic Information Card, and Sebastian-Soler's church's letter of membership in good standing. On April 19, 1990, INS received the foregoing documents. Sebastian-Soler's INS Form G-325, Biographic Information Card setting forth Sebastian-Soler's *new* address of residence as 11126 NW 4th Terr.

On April 19, 1990, INS additionally requested from Sebastian-Soler a letter about his beliefs regarding the bearing of arms, and Sebastian-Soler's driving record transcript. On September 19, 1990 Immigration Examiner (IE) Naington recommended to the district court that Sebastian-Soler's petition for naturalization be DENIED for lack of prosecution and non-compliance due to Sebastian-Soler not providing a letter regarding Sebastian-Soler's beliefs towards the bearing of arms, and Sebastian-Soler's drivers license record. Sebastian-Soler complied with INS's documentary request and submitted a cover letter containing his ***new*** address of residence to INS. On March 20, 1991, INS acknowledged receipt of the above mentioned documents and recommended Sebastian-Soler's naturalization petition be GRANTED to the district court.

On June 18, 1991, INS sent Sebastian-Soler a Notice of Naturalization Ceremony scheduled for July 11, 1991, to Sebastian-Soler's ***previous*** address of residence, 1370 West 71 St. Hialeah, FL 33014. INS failed to notify Sebastian-Soler of the July 11, 1991 naturalization ceremony and thus failed to appear.

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the requirements of law in effect when the petition was filed." § 408 *Continuation of current rules* (a)(2)(A) of Pub.L. 101-649, as amended Pub. L. 102-232, Title III, § 305 (n), Dec. 12, 1991, 105 Stat. 1750. *See* 8 C.F.R. §310.4(c) (2003).

The INS continued Sebastian-Soler's petition for naturalization. The naturalization record reflects that on April 19, 1990, March 20, 1991, and November 9, 1992, INS employees viewed Sebastian-Soler's "present" address of residence. On January 28, 1993, INS sent another Notice of Naturalization Ceremony scheduled for February 19, 1993, ***again***, to Sebastian-Soler's ***previous*** address of residence. On February 9, 1993, INS received returned notice that Sebastian-Soler had not received his notification. Sebastian-Soler again did not to appear at the naturalization ceremony due to the fact that INS had failed to notify him of such ceremony.

Between July 11, 1991 and January 28, 1993, more than eighteen (18) months of agency inaction transpired. On September 22, 1993, INS mailed, again, to Sebastian-Soler's ***previous*** address of residence its "***Notice*** of Proposed Recommendation of Denial of Petition for Naturalization" containing an overruling recommendation that Sebastian-Soler's naturalization petition be denied for "Lack of Prosecution". The "***Notice***" provided that Sebastian-Soler was scheduled to appear at a final hearing on his petition for naturalization in U.S. District Court, S.D. Florida on October 29, 1993.

On October 9, 1993, INS received a U.S. Postal Service return receipt and return notification that Sebastian-Soler was not residing at 1370 West 71st Street, that Sebastian-Soler had not received his correspondence, and that Sebastian-Soler's U.S. Postal Service forwarding order had expired.

On October 29, 1993, Sebastian-Soler did not appear at the final hearing in U.S. District Court because he had not been notified of such final hearing.

On November 12, 1993, Designated Examiner ("DE") Elba De Jesus submitted to the naturalization court an overruling and unlawful recommendation that Sebastian-Soler's petition for naturalization be denied for lack of prosecution which thereby overruled DE Meryl Latinsky's March 20, 1991 grant recommendation to the

naturalization court in violation of Title 8 U.S.C. §1446(d) (1988) and Title 8 C.F.R. §335.13(c) (1988).[3]

On same date, DE De Jesus also failed to submit *both* the adverse and favorable recommendations on Sebastian's petition for naturalization to the naturalization court also in violation of Title 8 U.S.C. §1446(d) (1988) and Title 8 C.F.R. §335.13(c) (1988). Such overruling recommendation stated Sebastian-Soler's naturalization petition had been recommended for denial by the person that "personally conducted" the "preliminary examination". The person that conducted Sebastian-Soler's preliminary examination was Immigration Examiner (IE) Naington. On March 20, 1991, IE Naington had recommended to the district court that Sebastian-Soler's naturalization petition be GRANTED.

In an order "entered November 18, 1993" by the Honorable U.S. District Court Judge Ursula Ungaro-Benages Sebastian-Soler's "Petition for Naturalization" numbered "239153" was denied for "Lack of Prosecution" based on the foregoing overruling and unlawful recommendations made by DE De Jesus.[4]

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[3] See INS Operations Instructions §335.5 (1988) and Kwok Wing Leung v. INS, 642 F.Supp. 607, 609 (E.D.N.Y. 1986).

[4] The Eleventh Circuit Court of Appeals dec[illegible]n in ***Sebastian-Soler v. U.S. Atty. Gen.***, 409 F.3d 1280, 1282 (11th Cir. 2005) reflects that "[i]n December 1993 the district court denied [Sebastian-Soler's] application." However, official naturalization court records uncovered in November of 2004 reveal that there exists a prior denial of Sebastian-Soler's judicial petition for naturalization on November 18, 1993. Immediately after Sebastian-Soler acquired the November 18, 1993 order denying Sebastian's judicial petition for naturalization, same order became the subject of a related proceeding before the Honorable U.S. District Court Judge Ursula Ungaro-Benages.
Upon U.S. District Judge Ungaro-Benages' review of the naturalization court records, an order dated December 20, 2004 was entered acknowledging her "ent[ry]" of the "November 18, 1993" "Order Denying David Sebastian's Petition for Naturalization # 239153." See ***Sebastian v. INS*, Case No. 02-21949-CV-UUB** (S.D.Fla. De[illegible]mber 20, 2004), affirmed ***Sebastian v. U.S. Dept. of INS***, Case No. 05-10147 (11th

On February 7, 1997, Sebastian-Soler was convicted of offenses involving Interstate Transport of Stolen Property in U.S. District Court for conduct occurring from May 1992 through November 1995.

On June 19, 2000, Sebastian-Soler submitted a Freedom of Information Act (FOIA) request to INS Miami District Office for the purpose of obtaining documentation to substantiate a possible claim of "derivative citizenship" based on Sebastian-Soler's Mother's naturalization on June 25, 1982. On December 3, 2001, Sebastian first received INS's FOIA response containing the documents Sebastian-Soler bases his nationality claim upon. On December 3, 2001, Sebastian-Soler first discovered he had actually filed his Petition for Naturalization and that he had complied with all of the statutory requirements for naturalization

On September 6, 2002, Sebastian-Soler completed the service of his seventy-seven (77) month sentence, at which time Sebastian-Soler was detained by INS and served with charging documents alleging him to be removable from the United States of America because of his convictions for dealing in stolen property and his status of alien.

Cir. October 3, 2005) (unpublished), 2005 U.S. App. LEXIS 21539, October 3, 2005. Subsequent to the discovery of U.S. District Judge Ungaro-Benages' November 18, 1993 order denying Sebastian's judicial petition for naturalization, on December 13, 2004, Sebastian-Soler submitted to the Honorable Judges of the October 8, 2004 oral argument panel his Second Supplemental Exhibits together with a motion to accept same. The Second Supplemental Exhibits contained U.S. District Judge Ungaro-Benages' November 18, 1993 order denying Sebastian-Soler's petition for naturalization, Sebastian-Soler's affidavit, Sebastian-Soler's mother's affidavit, as well as other crucial and relevant exhibits for the consideration of the Honorable Judges of the October 8, 2004 oral argument panel. Unfortunately, on May 19, 2005, the Eleventh Circuit Court of Appeals Chief Judge J. L. Edmondson denied Sebastian-Soler's Motion to Accept his Second Supplemental Exhibits as moot and therefore the foregoing critical documents were not considered by the judges of the reviewing court.

The Department of Homeland Security (DHS), detained Sebastian-Soler until his release through August 15, 2003 on an order of supervision.

Sebastian-Soler, through counsel, filed a timely appeal to the Board of Immigration Appeals. On June 1, 2004, the Board summarily affirmed the immigration judge's order denying the Sebastian-Soler's applications for relief as well as the order of removal.

Sebastian-Soler filed a timely petition review with the United States Court of Appeals for the Eleventh Circuit. The parties briefed the matter and thereafter the Eleventh Circuit Court of Appeals granted oral arguments on the matter. On October 8, 2004, oral arguments were held.

In a published opinion dated May 19, 2005, the Eleventh Circuit Court of Appeals denied Sebastian-Soler's petition for review. *Sebastian-Soler v. U.S. Attorney General*, 409 F.3d 1280 (11th Cir. 2005).

Sebastian-Soler, through counsel, filed a Petition for Rehearing En Banc with the reviewing court. On August 11, 2005, the reviewing court denied Sebastian-Soler's Petition for Rehearing *En Banc*.

On November 9, 2005, Sebastian-Soler, acting pro se, filed a petition for writ of certiorari with this Honorable Court. The Clerk of the Honorable Supreme Court of the United States requested that Sebastian-Soler resubmit his petition for review due to filing deficiencies to which Sebastian-Soler submits the instant petition for writ of certiorari.

Reasons for Granting the Petition

> "When courts 'deal with citizenship [they] tread on sensitive ground'". *U.S. v. Minker*, 350 U.S. 179, 197 (1956) (Douglas, J., concurring), *quoted approvingly in Nishikawa v. Dulles*, 356 U.S. 129, 135 *note* 6 (1958).

In recent years various United States Court of Appeals have issued decisions on nationality claims. See *Sebastian-Soler v. U.S. Attorney General*, 409 F.3d 1280, 1286 (11th Cir. 2005).

The majority of these nationality claims are premised upon aliens' claims that they "owe[] permanent allegiance to the United States" due to their having filed *applications* for naturalization or having resided in the United States for many years. 8 U.S.C. §1101(a)(22)(B).

Distinctly, Sebastian-Soler's nationality claim is premised upon his being "a citizen of the United States" (8 U.S.C. §1101(a)(22)(A)) due to his having been "admitted to citizenship." 8 U.S.C. §§1448(a) and 1449 (1988 Ed.).

For Sebastian-Soler to have been "admitted to citizenship" he had to have either "take[n] in open court an oath" of renunciation and allegiance (8 U.S.C. §1448(a) (1988)), or, as "a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1) to (4) and clause (5) (C)." 8 U.S.C. §1448(a) (1988)

The court below found that "[d]ue to religious scruples, [Sebastian-Soler] signed a modified oath of allegiance: one that omitted the commitments to bear arms on behalf of the Country and to perform non-combatant service in the military." *Sebastian-Soler* id. 1282.

Sebastian-Soler's naturalization record reflects Sebastian as being allowed to take the latter form of the oath containing "clauses (1) to (4) and clause (5) (C)". See Appendix G.

Prior to the reviewing court's issuance of the decision in *Sebastian-Soler*, the reviewing court stated the following in it's published decision in *Jean-Baptiste v. United States*, 395 F.3d 1190, 1192 (11th Cir. 2005):

> Once applicants have complied with the arduous naturalization requirements and have taken the oath of allegiance, they are, to use a baseball analogy, safe at home plate.

The seeming question begs an answer: did Sebastian-Soler make it to "home plate," or better stated: "take[] the oath of allegiance?"

In light of the foregoing, certain statutory terms had to be cautiously considered by the court below lest the a citizen of the United States suffer erroneous and unlawful removal from the United States.

The court below claimed it "reviews de novo legal questions arising from claims of nationality" (*Sebastian-Soler*, id. 1283), however, the reviewing court only referred, in part, to the following statutory term without defining same:

> ***"take in open court an oath"*** 8 U.S.C. §1448(a) (1988);

and further failed to correctly consider the following statutory terms or their applicability to Sebastian-Soler's citizenship claim:

> ***"take an oath"*** 8 U.S.C. §1448(a) (1988) (contained in the latter part of 1448(a) relating to modified oaths of allegiance);

> ***"admitted to citizenship"*** 8 U.S.C. §1448(a) (1988):

and,

> The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petition for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes ***any such employee so designated is authorized*** to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner ***for naturalization***. 8 U.S.C. §1446(b) (1988) (emphasis added).

The court below found "Immigration Officer Finnerty, act[ed] in her capacity as an INS Designated Examiner" as recognized under 8 U.S.C. §1446(b) (1988). *Sebastian-Soler*, id. 1282, and 1284 note 9.

If Sebastian-Soler was required to take the oath of allegiance in "open court," meaning in front of a judge, why then was Sebastian-Soler allowed to subscribe to the written oath of allegiance before the "INS Designated Examiner?

Are Sebastian-Soler's circumstances a deviation from controlling statute, a Service employee's mistake, or was Sebastian-Soler subjected to an internally recognized procedure, deemed invalid by the Service when convenient?

It is common practice that Jehovah's Witnesses and others who are exempted from taking the oath of allegiance in its complete form due to their religious scruples do not make any actions consistent with taking an oath of allegiance at their naturalization ceremonies.

yet same persons are presented with their certificates of citizenship at the naturalization ceremony or final hearing. [5]

Sebastian, as a Jehovah's Witness, was such a person. See *Sebastian-Soler*, id. 1282.

At what point then do these statutorily exempted persons become "admitted to citizenship" if they are not administered the modified oath of renunciation and allegiance at the naturalization ceremony or the final hearing?

Only when these persons are "admitted to citizenship" are these persons entitled to a certificate of naturalization. Title 8 USC §1449 and 8 U.S.C. §1450(b) (1988) (emph. add.)

Incidentally, records of the naturalization court revealed that certificate of naturalization # 15102728 was prepared for issuance to Sebastian-Soler as early as July 11, 1991 at his naturalization ceremony, prior to his having committed any offensive conduct. [6]

A certificate of naturalization cannot be issued unless the alien has "subscribed" to the written oath of allegiance. 8 C.F.R. §338.11 (1988).

The Immigration and Naturalization Service, relying upon on a November 18, 1993, order of court denying Sebastian-Soler's petition for naturalization, entered without Sebastian-Soler's notification, presence, or representation by an attorney all in violation of 8

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[5] Sebastian attempted to introduce into the lower court's record his and his mother's sworn affidavits detailing the procedures utilized in Sebastian-Soler's case as well as the fact that his mother, a Jehovah Witness, naturalized under the same judicial naturalization process, made no actions consistent with taking an oath of allegiance at her naturalization ceremony yet was handed a certificate of naturalization. On May 19, 2005, the court below denied Sebastian-Soler's motion to accept his second supplemental filing as moot without consideration the foregoing pertinent documents. Appendix C. Same supplement contained the order of court reflecting

6 Same supplement, rejected on May 19, 2005, by the court below, contained an order of court reflecting Sebastian-Soler's certificate of naturalization # 15102728.

C.F.R. §335.13 and Federal Rules of Civil Procedure 4 & 5 found that Sebastian continued to be an alien and therefore subject to removal due to his offensive conduct occurring *after* May 1992, years after he had subscribed to the final written oath of allegiance.

"This is the final affirmative act required of a petitioner. When the oath is subscribed to, the petitioner has reached his goal and is a citizen of the United States, on equal terms with all the rights and privileges accorded a natural-born citizen." *U.S. ex rel. Volpe v. Jordan*, 161 F.2d 390, 393 (7th Cir. 1940) 7 (emph. add.) (upheld in *Bindczyck v. Finucane*, 342 US 76 – 79 (1951)) U.S. v. Galluci, 54 F.Supp. 964 (D.C.Mass.1944); *In Re Oppenheimer*, 61 F.Supp. 403, 404 (D.C.Or.1945); *U.S. v. Kusche*, 56 F.Supp. 201, 232 (S.D.Cal.1944); 8 *Op.Atty.Gen.* 139, 141, 147, 150, 154 - 55, 158, 162, and 167 (1856); 9 *Op.Atty.Gen.* 356, 359 - 60 (1859); *Cf.* 8 C.F.R. §335.5 (2003).

Moreover, the Supreme Court has held that even in the absence of a "final order" of naturalization, a petitioner is already a "duly naturalized" citizen of the United States of America when record exist of the alien having taken the oath of allegiance.

> The oath, when taken, confers upon [the alien] the rights of a citizen, and amounts to a judgment of the court for his admission

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7. *Volpe* had exhausted all of his judicial avenues for relief, including the Supreme Court of the United States. On an appeal of the denial of a *habeas corpus* petition the Seventh Circuit Court of Appeals found that the issue of *Volpe's* continuing status of naturalized citizen had not been determined. The Seventh Circuit Court of Appeals also found that INS had not followed the regulations set forth in the INA regarding notice of denaturalization proceedings despite *Volpe's* voluntary waiver of such notice. The Seventh Circuit Court of Appeals further found that all of the prior judicial proceedings, including the Supreme Court's ruling, were void and of "no consequence". *Volpe*, id at 392. The Court of Appeals granted *Volpe's Habeas Corpus* petition and "turned the clock back" 27 years to the point where *Volpe's* constitutionally protected procedural Due Process right to notification of denaturalization proceedings had been violated.

> to those. It is therefore the unanimous opinion of the [Supreme C]ourt, that William Currie was duly naturalized. *Campbell v. Gordon*, 10 U.S. 176, 182 6 Cranch, 176, 3 L.Ed. 190 (1810) (emph. added) (a certificate that an alien had taken the oath prescribed was sufficient *without an order* admitting him to become a citizen)

A presumption is raised that if Sebastian-Soler was allowed to subscribe to the final written oath of allegiance before the naturalization court, he was *prima facie* eligible for naturalization.

The burden of proof in any naturalization case is upon petitioner and entails an ultimate showing that he possesses each of the requisite statutory qualifications. A *prima facie* case is established by a valid sworn petition. See INS Interpretations §336.1(e) (1988) (emph. add.).

Once the requisite facts were established by the allegations of the petition, Sebastian-Soler was entitled as of right to admission. 8 U.S.C. §1449 (1988) and 8 C.F.R. §337.1(c) (1988), *see also U.S. v. Schwimmer*, 279 U.S. 644 (1929) *and Baumgartner v. U.S.*, 322 US 665 (1944).

"[I]f [immigration employees] so prepared the applications for naturalization that the provisions of the act could not be observed, it should not affect the right of an applicant who complied with the formalities of the law and showed himself entitled to admission." In Re Freeze, 189 F. 1022 (D.C.Or.1911). (emph. add.).

Due to Sebastian-Soler's alleged "failure" [8] to appear at the naturalization ceremonies, the reviewing court conclusively found that Sebastian-Soler failed to comply with the "open court" requirement and therefore failed to meet the statutory requirements for naturalization" and therefore not a citizen of the United States. *Sebastian-Soler* id. 1286 – 85.

The foregoing circumstances thereby unlawfully stripped Sebastian of the "status, condition, [or] right in process of acquisition" he received when he was admitted to citizenship. See Section 408(d)(1) of Pub.L. 101-649, as amended by Pub.L. 102-232, Title III, § 305(n), Dec. 12, 1991, 105 Stat. 1750 titled "General savings provisions".

Clearly, Congress intended to protect the "status, condition, [or] right in process of acquisition" a naturalization petitioner received when he was admitted to citizenship. *Id. at* 8 U.S.C. §1421 (1999 Hard Bound Vol.) at "Historical and Statutory Notes", "Effective Dates".

Because the November 18, 1993 default judgment was entered in violation of due process it is a *per se* void judgment and therefore of no effect. *Yamashita v. Hinckle*, 260 U.S. 199 (1922); *U.S. ex rel. Volpe v. Jordan*, 161 F.2d 390, 392-93 (7th Cir. 1940).

> "A judgement is 'void' under Rule (60)(b)(4) if it [is] rendered without *jurisdiction* of the subject matter *or the parties or in a manner inconsistent with due process of law*." *Oakes v. Horizon Financial Services, S.A.*,

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[8] It should be noted that Sebastian-Soler "failed" to appear at the naturalization ceremonies due to Service employees' errors in failing to notify Sebastian of the final hearings in violation of 8 C.F.R. §335.13 and F.R.Civ.P. 4 and 5. Sebastian's judicial petition for naturalization 8 U.S.C. §§1421 et seq. (1988) governing "proceedings for admission to citizenship" are bereft of any ***statutory*** notification provisions. F.R.Civ.P. 4 and 5, govern notification and service upon ***parties*** in "civil" proceedings (F.R.Civ.P. 2) and are controlling over Petitioner's naturalization proceedings ***together with*** the ***regulatory*** notification provisions contained in 8 C.F.R. §§ 103.5a *and* 335.13 (1988). *See also Thompson v. INS*, 318 F.2d 681, 683 (7th Cir. 1963), *vacated on other grounds*, 375 U.S. 384.

259 F.3d 1315, 1319 (11th Cir. 2001) (emph. add.)

Moreover, denial of a naturalization petition for "Lack of Prosecution" by a district court is not an adjudication on the merits. Sebastian-Soler's judicial petition for naturalization could only be dismissed pursuant to 8 U.S.C. §1446(e) (1988). [9] Therefore, Sebastian's judicial petition for naturalization was not denied, but dismissed, and subject to reopening if found that he was in fact was properly administered the final oath of renunciation and allegiance.

Sebastian-Soler's moral character, qualifications for naturalization, or solemn modified oath of allegiance were therefore not considered by the district court on November 18, 1993, therefore these issues are not *res judicata*. *Knauer v. U.S.*, 328 US 654 (1946) *re'hg denied* 329 US 818, *petition denied* 332 US 834 (emph. add.); *see also Harisiades v. Shaughnessy*, 342 US 580 (1952), *reh'g denied* 343 U.S. 936., *Sourino v. U.S.*, 86 F.2d 309 (5th Cir. 1936), *cert. denied* 300 U.S. 661.

In accord with the Supreme Court's holding in *Campbell*, Sebastian-Soler already is a "duly naturalized" citizen of the United States of America. *Campbell, Id. at* 182. For all effects and purposes, Sebastian-Soler's naturalization petition continues to be "pending" in front of the United States District Court, Southern District of Florida since the dismissal for "lack of prosecution" cannot be sustained since the Service failed to serve Sebastian-Soler with notification of the naturalization ceremony in violation of 8 C.F.R. §335.13 (1988)

The rights derived by Sebastian-Soler in taking the modified oath of allegiance simply cannot be taken away without the proper procedural safeguards. The *res judicata* effect of Sebastian-Soler's signed oath of allegiance lies undisturbed. *Johannessen v. U.S.*, 225 US

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[9]. *Cf.* Fed. R.Civ.Pro. 4(j) (1988 - 93 Ed); 8 C.F.R. §334.18(b) (1988), INS Operations Instructions §§334.8(a)(2) and (3), (b)(3), (c), and 335.3 (1988), and INS Interpretations §336.1(f)(3)(1988).

227 (1912) (*res judicata* effect of oath); *Cf.* 8 C.F.R. §335.5 (2003).

In section 408(d)(1) of Pub.L. 101-649, as amended by Pub.L. 102-232, Title III, § 305(n), Dec. 12, 1991, 105 Stat. 1750 titled "General savings provisions", Congress recognized that a "status, condition, [or] right in process of acquisition" is created when a petitioner files a petition for naturalization.

It has long been Congressional purpose to protect naturalization applicant's rights, which have accrued, even in pre-petition stages. See *Shomberg v. U.S.*, 348 U.S. 540 (1955); *U.S. v. Menasche*, 348 U.S. 528 (1955) (provision providing for nonretroactive application of changes in law protects those whose naturalization process was in pre-petition stage when law changed); and *In Re Vacontios*, 155 F.Supp. 427, 430 - 31 (S.D.N.Y. 1957).

Because Sebastian-Soler complied with the statute by being "admitted to citizenship", he is entitled to a final order of naturalization, as early as March 11, 1988, or at least on March 20, 1991, the date INS recommended Sebastian-Soler's petition to be granted.

Sebastian-Soler's claim of nationality is therefore based on his being "admitted to citizenship" on March 11, 1988. Pursuant to 8 U.S.C. §1448(a), "admi[ssion] to citizenship" occurs when the alien has been administered the final oath of renunciation and allegiance.

Clearly, the reviewing court's failure to properly examine underlying governing statute stripped Sebastian-Soler of his "admitted-to-citizenship" status, which in turn subjects him to removal for his subsequent offensive conduct. Moreover, Sebastian-Soler was deprived the right to have a district court determine his citizenship.

An alien in deportation proceedings, claiming he is a citizen, and supporting that claim by substantial evidence, is *entitled* to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923)

(emph. add.); *See also U.S. v. Tod*, 290 F. 78 (2nd Cir. 1923), cert. stricken, 265 U.S. 590 (claim of citizenship which is *more than merely frivolous entitles alien* to a judicial hearing on the issue of citizenship); *see also Nung Fung Ho v. White*, 259 US 2 6, 282-84 (1922) *and Brewster v. Villa*, 90 F.2d 853 (5th Cir. 1937).

Sierra-Reyes v. INS, 585 F.2d 762, 764 (5th Cir. 1978) [10], provided the legacy court below with guidance on the matter. In *Sierra-Reyes*, the Fifth Circuit found that a frivolous claim of nationality was presented where no petition of naturalization had been filed. See also Clemons v. INS, Lexis 1532 (10th Cir.1994). Unlike the alien in Sierra-Reyes, Sebastian-Soler did file a petition for naturalization and therefore his citizenship claim is "nonfrivolous." Based on the foregoing analysis, and the Fed. R. Civ. P. 56 summary judgment principles enunciated in *Agosto*, Sebastian-Soler's "nonfrivolous" citizenship claim should have been transferred to the district court for "*de novo*" review. *Agosto*, id. 753. Notably, the court below ignored *Sierra-Reyes* in it's analysis despite its instructive and precedential value.

The reviewing court finding that Sebastian-Soler's citizenship claim presented only a "genuine issue of fact" as opposed to a "genuine issue of material fact" which would have entitled Sebastian-Soler to have his citizenship claim determined by a U.S. District Court.

However, without exploring the issue whether or not Sebastian took the oath in open court or if Sebastian-Soler was exempted from taking the oath

The reviewing court took it upon itself to make an inchoate "finding" that the "open court" requirement meant that the oath of renunciation and allegiance had to be taken before a "judge" or at a "court." *Sebastian-Soler*, id. 1284.

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10. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (Eleventh Circuit Court of Appeals, en banc, adopting as precedent the decisions of the former Fifth Circuit Court of Appeals rendered prior to October 1, 1981).

The court below made a critical error of law by stating that "[t]he only exception to [the "open court" and "judge"] requirements [is] if the petitioner 'is prevented by sickness or other disability from being in open court' -- is that the proceeding may be held "before a judge" in an alternate location." *Sebastian-Soler*, id. 1284.

Nowhere in 8 U.S.C. §1448(a) is there a requirement that a naturalization petitioner take the oath of renunciation before a judge nor that he or she must be present before the judge when the petition is being determined. The statutes are clear in the respect.

> The *requirement of subsection (a)* of this section for the examination of the petitioner under oath *before the court and in the presence of the court shall not apply in any case where an employee designated under section 1446(b) of this title has conducted the preliminary examination authorized by section 1446(b)* of this title ... 8 U.S.C. §1447(b) (1988) (emph. add.); *See also* House Report, Hearings H.R. 6127 (9980), 76th Congress, 1st Session, p. 464, 465

A *petition* for naturalization, in contrast, must be finally determined in "open court" before a "judge." 8 U.S.C. §1447(a) (1988).

> Every final hearing upon a petition for naturalization shall be had in *open court before a judge or judges* thereof ... except as provided in subsection (b) of this section ... 8 U.S.C. §1447(a) (1988) (emph. add.)

The "open court" requirements contained in §§1447(a) and 1448(a) (1988) are statutorily waived by §1447(b) (1988) when a preliminary examination pursuant to §1446(b) (1988) has been successfully conducted by a designated examiner. The waiver of the "open court" exception is also recognized in governing INS regulation.

Except as otherwise provided in the Immigration and Nationality Act, a petitioner ... for naturalization shall before being admitted to citizenship, take in open court the following oath of allegiance ... 8 C.F.R. §337.1(a) (1988) (emph. add.)

"[Oral] testimony was required to be presented at the final hearing of the petition in court, unless previously rendered at the equivalent preliminary hearing or examination conducted in accordance with the designated examiner system." INS Interpretations §335.1(c)(2)(i) (1988) (emph. add.).

"The effect of the new legislation [Act of June 8, 1926] was to eliminate ... not only the appearance of the witnesses at the subsequent court proceedings, but also the necessity for further examination of the petitioner before the judge during such proceedings." INS Interpretations §335.1(b)(1) (emph. add.) [11]

In contrast to Section 1447(a), which requires the 'final hearing' to 'be had in open court before a judge or judges thereof', Section 1448(a) clearly requires only that the oath of renunciation and allegiance be taken in "open court." There is simply no requirement that such oath be taken before a judge or judges of the court, as in the case of a final hearing under section 1447(a).

"The phrase 'open court' generally means either a court which has formally convened and declared open for the transaction of its proper judicial business, or a court which is freely open to the approach of all decent and orderly persons in the character of spectators. *United States v. Ginsburg*, 243 U.S. 472, 37 S.Ct. 422, 425 (1917).

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[11]. With the passage of the Act of December 29, 1981 (Pub.L. 97-116, § 15(c), 95 Stat. 1619), character witnesses to the petition for naturalization filed in court were no longer required. *See* INS Interpretations §335.1(b)(3a).

It means a court, which the public has a right to visit. *People v. Rose*, 82 Misc. 2d 429, 368 N.Y.S. 2d 387, 390." [12]

"It seems clear that the term "court" as used in Section 1448(a) is not necessarily synonymous with the term 'judge'; otherwise Congress would have been just as specific in its language in this respect as it has been with regard to Section 1447(a), wherein it speaks categorically and restrictively of an 'open court before a judge or judges thereof.' Generally, where the term 'judge' is used, it is not deemed synonymous with the term court' but as contradistinctive. *State ex rel. Mayer v. City of Cincinnati*, 60 Ohio App. 119, 19 N.E. 2d 902.

"The term 'court' has an institutional meaning relating to a tribunal, and not to an individual officer thereof, and it properly encompasses, as an action of the court, an action of an officer qualified to act for the court on delegation. *In Re Mifflin Chemical Corp.*, 123 F.2d 311, 313 (3rd. Cir. 1941); *United States v. Lieberman*, 199 F.Supp. 418, 419 (S.D.N.Y., 1961); *States ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 168 N.W. 2d 836, 838.

As Chief Justice Burger noted in his dissenting opinion in *Wingo v. Wedding*, 418 U.S. 461, 477-78 (1974), where Congress uses the term 'court' as distinguished from the phrase 'court, or justice, or judge,' 'Congress must have intended to broaden the authority of the court, at least to the extent of permitting delegation to a magistrate to perform certain judicial functions not inconsistent with the ultimate decisional responsibilities of a judge."

Regulations promulgated by the Attorney General demonstrates that Congress conferred upon designated examiners the authority "to perform *certain judicial functions*"(Wingo Supra, id. at 477-78 (emph. add.)) such as "*mak[ing] findings and recommendations to the*

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[12]. • **"Open court usu[ally] refers to a proceeding in which** *formal entries are made on the record ... A court session that the public is free to attend.*" ***Black's Law Dictionary, 7th Edition*** **(emph. add.)**

naturalization court ... rul[ing] upon applications for ... issuance of subpoenas ... *issu[ing]* subpoenas in the proper cases, *grant[ing] or den[ying] continuances*, and *rul[ing]* on all objections to the introduction of evidence, which *rulings shall be* evidence on the record .... 8 C.F.R. §335.11(b) (1988) (emph. add.); *See also* 8 C.F.R. §335.11(h) (1988).

The foregoing procedure was recognized in *In Re: United States of America (U.S.A.), Immigration and Naturalization Service (INS)*, Case No. 76-3358 (5th Cir.) [13] wherein INS and the U.S. District Court Judges of the Southern District of Florida, as adverse parties, argued over the same statutes at issue in Sebastian-Soler's case, 8 U.S.C. §§1446, 1447, and 1448, in dealing with similar issues, "open court", and "final hearing[s]". Notably, the Honorable Judges of the district court and the INS agreed that the oath of renunciation and allegiance were administered, in the majority of naturalization cases, by the clerks of naturalization court. In the Aug. 1, 1977 Order of Clarification in *In Re: U.S.A. INS, the Fifth Circuit stated the following:*

> "The [D]istrict [C]ourt [for the Southern District of Florida] contends no such final hearing is required when an employee designated under 8 U.S.C. §1446(b) has conducted a preliminary examination, and the petitioner has not demanded such a hearing. The construction placed on the statute by the District Court is reasonable and permissible ... The entry of the naturalization order, which finalizes the naturalization process, would remain the

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13. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (Eleventh Circuit Court of Appeals, ***en banc***, adopting as precedent the decisions of the former Fifth Circuit Court of Appeals rendered prior to October 1, 1981.

task of the [District Court] judge, at which time the petitioners need not be present."

In an unrelated civil suit INS designated examiners argued in they acted as "judges and advocates", "special master[s]", or "masters in chancery" during judicial naturalization proceedings. *Leopold et al. v. U.S. Civil Serv. Comm.et al.*, 1974 U.S. Dist. LEXIS 9238, Dist. Ct. Case No. 71-C-292 (E.D.N.Y. March 29, 1974).

Ms. Finnerty was an INS employee who admittedly was "authorized to ... administer oaths, including the oath of the petitioner for naturalization" and who filed same oath of allegiance with the "[d]eputy clerk" of the naturalization court. 8 U.S.C. §1446(b)(1988). See Appendix G.

Ms. Finnerty, acting in her dual role of Designated INS Examiner and "Deputy clerk" of the naturalization court was "making formal entries on the record." [14] Such actions were the "action[s] of an officer qualified to act for the court on delegation." The office of the designated examiner was "open for the transaction of [the naturalization court's] proper judicial business" therefore Sebastian-Soler subscribed to his modified oath of allegiance in "open court". *Supra* pages 20 - 21

If the foregoing procedure was to be consummated at the naturalization ceremony or the final hearing, why was the Designated Examiner allowed to administer such oath to Sebastian-Soler?

Congress originally mandated final hearings to be conducted in "open court" to "prevent well known abuses by

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[14] Sebastian possesses documentary evidence suggesting Ms. Finnerty as having initialed her name to the line reserved for the "Deputy Clerk of Court," making it even more compelling that Sebastian-Soler be given the opportunity to prove his legal theories in a district court upon transfer of his case pursuant to 8 U.S.C. §1252(b)(5)(B).

means of publicity throughout the entire proceedings." *U.S. v. Ginsburg*, 243 U.S. 472, 475 (1917). [15,16]

In the alternative, Sebastian-Soler was statutorily exempt from stating the oath in its entirety. Sebastian-Soler was only required to "take an oath" as opposed to "tak[ing] in open court an oath." See 8 U.S.C. §1448(a) (1988) (see latter part of §1448(a)).

The statutes in question contain language that is unambiguous and clearly expresses the intent of Congress. *INS v. St. Cyr*, 533 U.S. 289, 320 (U.S. 2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984).

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous intent of Congress." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 (U.S. 1987).

Sebastian-Soler therefore possesses two (2) bona fide underlying legal theories under which he claims citizenship.

Sebastian-Soler therefore adamantly sought relief from the reviewing court in the form of transfer of his citizenship claim to the United States District Court for development of these "genuine issue[s] of material fact." 8 U.S.C. §1252(b)(5)(B)

Sebastian's legal underlying theories are reasonable and therefore a "genuine issue of material" was presented as opposed to the reviewing court's erroneous finding that Sebastian-Soler presented only a "genuine issue of fact."

The reviewing court made a statutorily deficient and inchoate determination that Sebastian-Soler had

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[15] "[T]he [1926 designated examiner] system proved so effective that Congress extended it under the ... 1940 statute to those state courts willing to adopt it." INS Interpretations §335.1(b)(2) (1988).

[16] The Attorney General promulgated regulation mandating that "[p]reliminary examinations shall be open to the public" in judicial naturalization proceedings. 8 C.F.R. §335.11(a) (1988). Sebastian-Soler's preliminary examination was "open to the public".

"failed" to take the citizenship oath in "open court" (Sebastian-Soler, 1284 – 85) without allowing Sebastian-Soler the right to "de novo determination" of these "genuine issues" as well as factual development of the "underlying legal theor[ies]" in district court as recognized in the controlling case *Agosto v. U.S.*, 436 U.S. 748 (1976).[17]

The published decision's failure to define pertinent statutory term such as "open court," "admitted to citizenship," as well as the term "authorized to ...administer oaths, including the oath of the petitioner for naturalization" as contained in 8 U.S.C. §§1446 – 1450 (1988) was vital omission since Sebastian's alleged "failure" to comply with the "open court" requirement profoundly influenced the panel of judge's to find Sebastian as not having been "admitted to citizenship." Therefore the published decision fails to provide the similarly situated general public and the courts much needed guidance to determining whether an alien has met the "open court" requirement contained in 8 U.S.C. §§1447 and 1448 (1988) and thereby violated Sebastian's right to have his citizenship claim properly considered under the tenets of *Agosto* and 8 U.S.C. §1252(b)(5)(B).

Although the language of the transfer statute (8 U.S.C. §1105a (repealed by Pub.L. 104-208)) was slightly modified, and transferred to 8 U.S.C. §1252(b)(5)(B), the "summary judgment principles" enunciated in *Agosto*, which mandate a court of appeals to transfer a citizenship claim to a district court have not been repealed nor diminished. The repeal of §1105a and the ensuing transfer of the citizenship-claim-transfer-statute to 8

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17 In Agosto the Supreme Court remanded Agosto's nationality claim to the district court relying only on the testimony of Agosto and his parents as to Agosto's birth in the U.S. despite "Service's documentary proof of Agosto's alienage consisting of an "entry [of] [a] registry of birth[s] and an Italian baptismal record): Sanchez-Sanchez v. U.S. INS, 957 F. 2d 702, 703 note 1 (9th Cir. 1992): Dung Van Chau v. INS, 247 F.3d 1026, 1028 (9th Cir. 2001): Lim Kwock Soon v. Brownell, 253 F.2d 809 (5th Cir. 1958).

U.S.C. §1252(b)(5) simply limited the review of removable aliens' citizenship claims to removal proceedings under *§1252(b). See 8 U.S.C. §1252(b)(5)(C).*

The reviewing court also erred in denying Sebastian-Soler's motion to accept Sebastian's-Soler's Second Supplemental filing containing Sebastian-Soler's and his mother's affidavit which would have provided the reviewing court essential evidence that would have allowed transfer of Sebastian's case to a district court for consideration of his citizenship claim.

The reviewing court's published decision fails to consider Congressional authority conferred upon designated examiners to "administer oaths, including the oath of the petitioner for naturalization." 8 U.S.C. §1446(b) (1988) (emphasis added).

The panel failed to consider "affidavits and pleadings" submitted by Sebastian, which are permissible under 8 U.S.C. §1252(b)(5)(b). See 8 U.S.C. §1252(b)(4). Appendix C.

Same "affidavits and pleadings," substantiate Sebastian-Soler's claim that he indeed was administered the final oath of renunciation and allegiance under known procedures utilized by the Immigration and Naturalization in 1988, which satisfied the "open court" requirement, or in the alternative, waived the "open court" requirement.

It is therefore essential to provide the Courts of Appeal with guidance on this matter to preserve what is now an alien's only opportunity to have his citizenship claim considered in removal proceedings. 8 U.S.C. §1252(b)(5)(C).

Moreover, 8 U.S.C. §1448(a) specifically omits the "open court" requirement for "person[s] who shows by clear and convincing evidence to the satisfaction of the naturalization court that [they were] opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief."

The decisions of the reviewing court fails to follow controlling Federal Rules Civil Procedure 56 summary *judgment principles in determining* whether a "genuine issue of material fact exists" for the purposes of 8 U.S.C. §1252(b)(5)(B).

The reviewing court also exceeded its statutory authority by assuming the role of "naturalization court" in making a finding that Sebastian-Soler "is now statutorily ineligible for naturalization." *Sebastian-Soler*, id. 1287 note 14.

Sebastian-Soler was entitled to have such determination made by a naturalization court as guaranteed to him by 8 U.S.C. §1447(b) (1988) if Sebastian so "demand[ed]," but, however, was prevented from doing so due to Service employees' admitted and recognized failure to notify Sebastian-Soler of adverse determinations against his petition all in violation of 8 C.F.R. §335.13 (1988). See *Sebastian-Soler, id.* Page 1282.

The decision also errs in finding that Sebastian-Soler "has a redressability problem" (Sebastian-Soler, id. 1287 note 14) due to his subsequent offensive conduct especially when there exists substantial violations of Sebastian-Soler constitutionally protected procedural due process rights to have his judicial petition for naturalization processed according to governing statute and promulgated regulation.

> No person shall be denied the right to apply for naturalization in accordance with the procedure prescribed in this subchapter to any court authorized to exercise naturalization jurisdiction. 8 C.F.R. §334.1 (1988).

Sebastian-Soler's circumstances warrant favorable consideration of relief *nunc pro tunc*, "an effective remedy" available to judges in the proper circumstances. *Mitchell v. Overman*, 103 U.S. 62, 64 - 65 (1881).

The decision goes contrary to the Supreme Court's holding that a final order of naturalization is not

necessary to find that a person has been naturalized. The administration of the oath is what confers citizenship upon the alien, not the entry of the naturalization order. id. *Campbell v. Gordon.*

Simply stated, were Sebastian-Soler given the opportunity in a district court to demonstrates that the circumstances under which he was administered his oath of allegiance statutorily qualified as "open court" or, alternatively, that the statute exempted him from the "open court" requirement due to his religious convictions — and in doing so prevailed — he then would be deemed to have been "admitted to citizenship" (8 U.S.C. §§1448(a), 1449, and 1450(b) (all 1988)) and therefore a citizen of the United States not amenable to deportation. 8 U.S.C. §1101(a)(22)(A). Sebastian-Soler is entitled to this only opportunity (8 U.S.C. §1252(b)(5)(C)), however, due to the lower court's ephemeral review of the issues, facts, and the statutes involved Sebastian lost this only opportunity to establish his citizenship claim.

This Honorable Court now has the exclusive authority to remand the matter to the lower court to allow Sebastian-Soler for the opportunity to establish his citizenship claim and should do so due to the strong likelihood that a citizen of the United States may be in jeopardy of being erroneously and unlawfully deported.

Conclusion

WHEREFORE, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Hialeah, Florida 33014
Tel: (305) 778-4867

(SECTION TWO)
APPENDICES TO
PETITION FOR WRIT OF CERTIORARI

A. The Eleventh Circuit Court of Appeal's August 11, 2005, decision denying Sebastian-Soler's Petition for Rehearing *En Banc*

B. The reviewing court's May 19, 2005, published opinion denying the Sebastian-Soler's petition for review in *Sebastian-Soler v. U.S. Attorney General*, 409 F.3d 1280 (11th Cir. 2005)

C. Reviewing Court's May 19, 2005, ORDER denying Sebastian-Soler's "second notice of supplemental exhibits" as "moot."

D. The Executive Office of Immigration Review ("EOIR"), Board of Immigration Appeal's ("BIA"), May 16, 2003, administrative decision in In Re: Sebastian-Soler, (A18-229-818) (BIA, May 16, 2003)

E. The EOIR, Office of the Immigration Judge ("OIJ"), Bradenton, Florida's January 8, 2003, administrative order of removal entered in *Matter of Sebastian-Soler*, et al., ((A18-229-818) (EOIR-OIJ, January 8, 2003)

F. The EOIR, OIJ's, Bradenton, Florida's November 22, 2002, administrative order denying the Sebastian-Solers' motion to terminate removal proceedings based upon Sebastian-Soler's claim of United States citizenship and Sebastian-Soler's motion to reconsider and the immigration *Matter of Sebastian-Soler*, et al., ((A18-229-818) (EOIR-OIJ, November 22, 2002)

G. Sebastian-Soler's Naturalization Petition #239153 and Reverse Side thereof Containing Sebastian-Soler's Modified Affidavit of Renunciation and Allegiance

H. Text of Constitutional and Statutory Provisions Involved

(APPENDIX A)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12934-AA

DAVID SEBASTIAN-SOLER,

Petitioner,

versus

("Filed U. S. Court of Appeals[,] Eleventh Circuit[,] August 11, 2005[,] Thomas K. Khan[,] Clerk")

U.S. Attorney General,

Respondent.

Petition for Review of a Decision
of the Board of Immigration Appeals

Before: EDMONDSON, Chief Judge, WILSON, Circuit Judge, RESTANI*, Judge.

PER CURIAM :

The petition(s) for rehearing filed by Appellant is DENIED.*

ENTERED FOR THE COURT
[signed by Edmondson, Chief Judge]

CHIEF JUDGE

*Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

ORD-41

(APPENDIX B)

(*Sebastian-Soler v. United States AG*, 409 F.3d 1280 (11th Cir. 2005)

(PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

("Filed U. S. Court of Appeals[,] Eleventh Circuit[,] May19, 2005[,] Thomas K. Khan[,] Clerk")

No. 03-12934
BIA Nos. A18-229-818

DAVID SEBASTIAN-SOLER,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the

Board of Immigration Appeals

(May 19, 2005)

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI , * Judge.

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

[pg.1282] PER CURIAM:

Petitioner David Sebastian-Soler, a Cuban immigrant and resident alien, appeals his removal order issued by the Immigration Judge and summarily affirmed by the Board of Immigration Appeals. Petitioner argues that he is no alien and thus not removable under 8 U.S.C. § 1227(a)(2)(A)(iii). Because we conclude Petitioner is an alien, we dismiss the appeal.

Background

Petitioner immigrated from Cuba to the United States in 1969, obtained permanent resident status in 1974 and applied to file for naturalization in 1987. As part of his preliminary examination he appeared in March 1988 before Immigration Officer Finnerty, acting in her capacity as an INS Designated Examiner. At this proceeding Petitioner signed a petition for naturalization that [1] included an oath affirming the truthfulness of the application's contents and Petitioner's intent to take an oath of allegiance should his application be granted.

On the back of the form was the oath of allegiance for citizenship, which

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[1] INS Form N-405.

Petitioner also signed. Officer Finnerty then continued Petitioner's application [2] pending receipt of additional documents she had requested. [3] The INS [4] reviewed his application three times during the next two years and ultimately recommended it be denied because Sebastian had failed to submit all of the requested documents. In October 1990 Sebastian sent the remaining documents that Officer Finnerty had requested, and the INS recommended approval in March 1991. Along with the requested documents, Petitioner sent an updated biographical information card containing his address, which had changed since his initial application was filed.

In June 1991 the INS mailed -- to his former address, the one he gave when he first applied -- a notice to Petitioner informing him of the final hearing on his petition before a district court in which he was to participate and to take the oath of citizenship. Petitioner never received the notice, and it was returned to the INS.

In May 1992 Petitioner began a criminal career that lasted until November 1995

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[2] Due to religious scruples, Petitioner signed a modified oath of allegiance: one that omitted the commitments to bear arms on behalf of the Country and to perform non-combatant service in the military.

[3] Officer Finnerty requested documentation on Petitioner's affiliation with the Jehovah's Witnesses, of which he professed to be a member. Also, due to Petitioner's poor driving record, Finnerty requested official driving record reports for further evaluation.

[4] The INS ceased to exist as an independent agency on 1 March 2003, when its functions were assigned to the newly formed Department of Homeland Security. Because the underlying events at issue in this appeal occurred before the INS's dissolution, we will refer to that agency as the INS.

and culminated in his seven-count felony conviction [5] in May 1997. The INS twice more sent notices to Petitioner's previous address that were returned without his receiving them: one on 28 January 1993 noticing another final hearing on his petition and one on 22 September 1993 noticing a hearing before the district court to consider the INS's recommendation that his petition be denied for lack of prosecution. In December 1993 the district court denied Petitioner's application.

[pg. 1283] After Petitioner in October 1990 sent the last of the required documents to the INS to complete his application, the record indicates that he did not inquire
about the status of his naturalization petition until over nine years later: in June 2000 while he was serving a 77-month sentence for his convictions. Petitioner (in December 2001 when he received documents from the INS in response to his June 2000 FOIA request) learned of the mailing error: the noncurrent address. Upon Petitioner's release in September 2002, the INS charged Petitioner under 8 U.S.C. § 1227(a)(2)(A)(iii) [6] and initiated removal proceedings.

The IJ sustained the charge of removability, found Petitioner ineligible for relief or asylum, and ordered his removal to Cuba. On appeal the BIA summarily

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[5] Petitioner was convicted under 18 U.S.C. § 371 (Conspiracy to transport, receive and sell stolen goods in Interstate and Foreign Commerce) and 18 U.S.C. § 2314 (Transportation of stolen goods in Interstate Commerce).

[6] Section 1227(a)(2)(A)(iii) establishes the commission of an aggravated felony as a condition for an alien's removal.

affirmed the IJ's decision, making it the final agency determination on the matter. *Gonzalez-Oropeza v. United States Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003). Petitioner now appeals that decision. He contends that he is not subject to removal because he is either a citizen or a national of the United States.

Standard of Review

We review de novo legal questions arising from claims of nationality. See 8 U.S.C. § 1252(b)(5) (vesting authority to decide nationality claims in courts of appeals);[7] see also *Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004).

Our review of final removal orders is strictly limited by 8 U.S.C. §1252(a)(2)(C): "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii) . . . ."[8] Where our

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[7] For us to decide Petitioner's nationality claim, no genuine issue of material fact can exist about the claim; otherwise, we must transfer the mater to the district court for resolution. 8 U.S.C. §1252(b)(5)(A)-(B). A genuine issue of fact does exist about whether INS Officer Finnerty actually administered a modified oath of allegiance to Sebastian during his preliminary investigation. This fact, however, is not material: even had Petitioner taken the oath at that time, it would not satisfy the statutory prerequisite for citizenship that Petitioner take the oath of allegiance in "open court." See 8 U.S.C. § 1448(a) (1988).

[8] Because removal proceedings were commenced against Petitioner after 1 April 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), IIRIRA's permanent rules apply to this case. See *Fernandez-Bernal v. Att'y Gen. of the United States*, 257 F.3d 1304, 1306 n.1 (11th Cir. 2001).

review is limited by statutory conditions, "we retain jurisdiction to determine only whether these conditions exist." Brooks v. Ashcroft, 283 F.3d 1268, 1272 (11th Cir. 2002). Thus, if we determine that Petitioner is (1) an alien; (2) who is removable; (3) because he committed a criminal offense described in the statute, we must divest ourselves of jurisdiction to inquire further. Id. Despite this jurisdiction-stripping provision, our precedent says we also retain jurisdiction to consider substantial constitutional claims raised by Petitioner. Id. at 1273.

Discussion

Petitioner only contests one condition of his removal -- that he is an alien -- by arguing alternatively that he is either a duly naturalized citizen or a national of the United States. Neither argument has merit.

[pg. 1284] I. Petitioner is not a Citizen of the United States.

Petitioner first argues that he is a duly naturalized citizen of the United States. He says he is ineligible for removal, by virtue of his subscribing to the

oath of allegiance during his application process coupled with the fact that the INS later recommended his naturalization petition be granted. Because Petitioner has not met the statutory requirements for naturalization, this argument fails.

The law, at the time of Petitioner's application, vested in the judicial branch exclusive jurisdiction to naturalize persons. 8 U.S.C. § 1421(a) (1988). Before a court conferred citizenship on someone, the court had to conduct an examination of the applicant that included, among other things, an investigation of the applicant's moral character. Id. §§ 1443(a); 1447(a). At the time of Petitioner's application, the United States Attorney General was authorized to conduct the required preliminary examinations for the purpose of making the appropriate recommendations to naturalization courts. Id. § 1443(a). To accomplish this examination the Attorney General named INS employees as Designated Examiners who were empowered to take testimony and administer oaths in furtherance of these examinations. Id. § 1446(b). The recommendations resulting from the examinations were to be submitted to and considered by the court in its final determination of whether or not to confer citizenship. See id. § 1446(d).

If a court decided to confer citizenship, two requirements then had to be met. First, a final hearing on the petition must be held in open court. Id. § 1447(a). Second, the petitioner must take an oath of renunciation and allegiance

in open court. Id. § 1448(a). The only exception to either of these requirements -- available if the petitioner "is prevented by sickness or other disability from being in open court" -- is that the proceeding may be held "before a judge" in an alternate location. Id. §§ 1447(a); 1448(c) (emphasis added).

That Petitioner neither appeared before a judge for a final hearing on his petition nor took the oath of allegiance before a judge (in open court or elsewhere) is undisputed. Petitioner, nevertheless, asserts that he is a naturalized citizen, reasoning that, because the INS had at one time recommended his citizenship petition be granted and that because he had subscribed to the oath of allegiance at a preliminary examination before an INS officer, he has met all the requirements for naturalization. Petitioner specifically argues that INS Officer Finnerty was functioning as a deputy clerk of court when she administered the oath during the preliminary examination, thus satisfying the "open court" requirement. This argument fails for several reasons.

First, nothing in the record indicates that Officer Finnerty was, in fact, purporting to act as a deputy clerk of court when administering the oath to Petitioner.[9] More important, nothing indicates Officer Finnerty was authorized by

[9] At the bottom of the reverse side of INS Form N-405, where a version of the oath of allegiance is contained, two signature lines appear on either side of the document. One says, "WHEN OATH ADMINISTERED BY DESIGNATED EXAMINER;" the other says, "WHEN OATH ADMINISTERED BY CLERK OR DEPUTY CLERK OF COURT." On Petitioner's application Officer Finnerty signed on the line for Designated Examiners.

law to do so. A deputy clerk of court is an employee of the judicial branch of government. Officer Finnerty was an employee of the executive branch.

Second, even if Officer Finnerty administered the oath to Petitioner, it was not done in open court. The statute only **[pg. 1285]** authorized one exception to the oath's "open court" requirement: that if the petitioner was unable to appear in open court due to sickness or disability, the oath was to be taken "before a judge of the court at such place as may be designated by the court." 8 U.S.C. § 1448(c) (1988).

Petitioner does not assert a disability that kept him from open court. Even if he had, the statute only excepts the locality of the oath-taking, not the manner in which it is to be taken: that is, before a "judge." The statutory language makes clear that an oath administered in an INS office by an INS officer -- before the INS officer has even completed a preliminary investigation or made any recommendations -- fails to fit into this lone and narrow exception. [10]

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[10] That the final oath of allegiance is a distinct, and later-in-time, process from the application and preliminary examination process is a concept that is neither novel nor surprising; and a concept that runs throughout this Country's statutory governance of naturalization. See, e.g., 8 C.F.R. § 316.10(a)(1) ("An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character. This includes the period between the examination and the administration of the oath of allegiance.") (emphasis added).

Third, regardless of whether the INS had at one time recommended Petitioner for citizenship or whether Petitioner had taken the oath of allegiance, the authority to confer citizenship upon Petitioner rested exclusively with the judicial branch. The district court in this case never conferred citizenship on Petitioner.

Because Petitioner has failed to meet the statutory requirements for naturalization, we readily conclude that Petitioner is no citizen of the United States.

II. Petitioner is not a National of the United States.

Petitioner next argues that he is ineligible for removal because he is no alien, but rather a national of the United States, by virtue of his asserted permanent allegiance to this Country. Petitioner points mainly to his longtime residence and application for citizenship as evidence of this permanent allegiance.[11] Because we

[11] Petitioner also asserts that, as part of the totality of the circumstances to be considered in assessing his allegiance to the Country, his moral character should be viewed at the point in time at which he either applied for citizenship or at which his application was recommended favorably by the INS to the courts. This view in effect eliminates consideration of the aggravated felonies Petitioner committed beginning after the first, but before the second, notice of his final hearing. Regardless of when he was convicted, because Petitioner committed these aggravated felonies before taking his final oath (which was never done), this argument is unavailing. See Unites [sic] States v. Jean-Baptiste, 395 F.3d 1190, 1192 & n.2 (11th Cir. 2005).

conclude that a person can become a national of the United States only through birth or naturalization. Petitioner's argument fails.

Congress has defined a "national of the United States" to mean either a citizen of the United States or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). This definition, however, does not set out the conditions by which one comes to owe this permanent allegiance. Congress, under Title 8 of the Unites States Code in Subchapter III of Chapter 12, has set out the routes to nationality and naturalization in this Country. There are two. Part I of the Subchapter governs nationality at birth and collective naturalization. 8 U.S.C. §§ 1401-1409. Part II governs nationality through naturalization. 8 U.S.C. §§ 1421-1458. **[pg. 1286]** Under the terms of the relevant statutory scheme, then, the only methods Congress has made available by which a person may attain the status of a national of the United States (other than nationality conferred by Congress through its act or acquisition of territories) are by birth or naturalization. We see no other avenue to nationality or citizenship supplied by Congress in the statute, and we decline to create one. All United States citizens are United States nationals, but not all nationals are citizens. Because Petitioner is not a naturalized citizen, the only provision under which he could possibly be deemed a national is 8 U.S.C. § 1408:

"Nationals but not citizens of the Unites States at birth." (Emphasis added). That provision supplies four categories of persons deemed to be nationals:

> Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:
>
> (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession; [12]
> (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;
> (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and
> (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a [prescribed] period . . . . 8 U.S.C. § 1408.

Petitioner fits into none of these categories. Accordingly, we conclude that Petitioner is no national of the United States.

We note that our conclusion that one may become a national only by birth in a United States territory or by completing the naturalization process after birth

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[12] The only people currently holding this status seem to be people from American Samoa and Swains Island. See 8 U.S.C. § 1101(a)(29).

comports with the historical meaning of the term "national" as well as the statutory and regulatory context governing aliens and nationality. In *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964 (9th Cir. 2003), cert. denied, 124 S.Ct. 1041 (2004), the Ninth Circuit conducted a thorough and well-reasoned analysis of these corroborative factors. We think that analysis is persuasive and, because we reach the same result, see no reason to duplicate it here. In addition to the Ninth Circuit, we join a number of other circuits (and the Board of Immigration Appeals) that have either explicitly come to the same conclusion or have impliedly adhered to the same view. See *United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003) (explicit); *Salim v. Ashcroft*, 350 F.3d 307, 310 (3d Cir. 2003) (explicit); *Oliver v. INS*, 517 F.2d 426, 427-28 & n.3 (2d Cir. 1975); *In re Moises Navas-Acosta*, 23 I.&N. Dec. 586, 586-88 (BIA 2003); see also *Igartua De La Rosa v. United States*, 229 F.3d 80, 87 n.12 (1st Cir. 2000) (Torruella, J., concurring) ("The only persons currently holding [national] **[pg. 1287]** status are residents of American Samoa and Swains Island.") The circuit decision on which Petitioner mainly relies is *United States v. Morin*, 80 F.3d 124, 126-27 (4th Cir. 1996).[13] *Morin* is a federal sentencing

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[13] Petitioner also attempts to rely on decisions from the Fifth and Eighth Circuits in support of his position. The Fifth Circuit has explicitly reserved the question. *Alwan v. Ashcroft*, 388 F.3d 507, 513 (5th Cir. 2004). The Eighth Circuit rendered a decision tending to corroborate our conclusion here today. See *Carreon-Hernandez v. Levi*, 543 F.2d 637, 638 (8th Cir. 1976) (adopting reasoning of district court decision below, *Carreon-Hernandez v. Levi*, 409 F. Supp. 1208, 1210 (D. Minn.1976), rejecting petitioner's argument that long residence in United States sufficed for permanent allegiance and deciding that petitioner was deportable "because she didn't go through the naturalization process"). Accordingly, the law of neither circuit is helpful to Petitioner here.

guidelines case in which the Fourth Circuit construed the federal murder-for-hire statute and, in its conclusion that the defendant's intended victim qualified as a national, noted that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." Id. at 126.

That statement was offered with no explanation or citation to authority. As such, we -- like the Third, Ninth and Tenth Circuits -- find *Morin* wholly unpersuasive on the issue before us.

Conclusion

Because we conclude that Petitioner is an alien as a matter of law and that he raises no meritorious constitutional claims in conjunction with his removal

hearing, our jurisdiction under 8 U.S.C. § 1252(a)(2)(C) to review the IJ's [11] removal order proceeds no further. Accordingly, Petitioner's appeal is dismissed.

DISMISSED.

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[11] Petitioner asserts that the district court's denial of his naturalization petition violated his procedural due process rights because, as a result of the INS's failed notices, Petitioner had no opportunity to be heard at that proceeding. We acknowledge that "[d]ue process requires that aliens be given notice and opportunity to be heard in their *removal* proceedings." *Fernandez-Bernal*, 257 F.3d at 1311 n.8, (emphasis added). And we will assume, without deciding, that a naturalization proceeding could be so integral to a removal proceeding to warrant our review of constitutional violations alleged to have taken place in the naturalization proceeding. But, even if he could state a cognizable constitutional claim, we conclude that Petitioner has a redressability problem: even if we directed the reopening of his naturalization proceeding, Petitioner could not now obtain the relief he seeks because, due to his own conduct, he is now statutorily ineligible for citizenship by virtue of his having committed aggravated felonies. 8 U.S.C. §§ 1101(f)(8), 1427(a); *cf. Zayed v. United States*, 368 F.3d 902, 903 (6th Cir. 2004) (affirming denial of naturalization petition on basis that district court "lacked the power to grant an effective remedy" due to petitioner's being statutorily ineligible for naturalization).

Petitioner's only claim of a due process violation within his *removal* proceedings has to do with the IJ's denial of his request to subpoena the reverse side of the INS Form N-405 that allegedly memorializes Petitioner's subscribing to the modified oath of allegiance during the course of his preliminary investigation. This claim also fails. We have considered that document and concluded that even if it proves, as Petitioner contends, Petitioner took the oath of allegiance at some point in the application process, the oath would fail to satisfy the statutory requirement that citizenship cannot be conferred on an applicant until that applicant has taken that oath in open court. Thus, even if Petitioner could show a due process violation on account of no subpoena, he cannot show that he was substantially prejudiced. See *Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir. 1987).

(APPENDIX C)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12934-AA

DAVID SEBASTIAN-SOLER,

Petitioner,

versus

("Filed U. S. Court of Appeals[,] Eleventh Circuit[,] May 19, 2005[,] Thomas K. Khan[,] Clerk")

U.S. Attorney General,

Respondent.

Petition for Review of a Decision
of the Board of Immigration Appeals

ORDER :

Petitioner's motion to accept second notice of supplemental exhibits is hereby denied as moot.

[signed by Edmondson, Chief Judge]

CHIEF JUDGE

(APPENDIX D)

("Department of Justice") U.S. Department of Justice
(seal)

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Soto, Eduardo, P.A.
999 Ponce De Leon Blvd.
Suite 940
Coral Gables, FL
33134-0004

U.S. INS, Litigation
Unit/BDC
515 11th St. West,
Bldg. B, 3rd
Bradenton, FL 34205

Name: SEBASTIAN-SOLER, DAVID A18-229-818

Date of this notice: 05/16/2003

Enclosed is the copy of the Board's decision and order in the above-referenced case.

(signed)

Jeffery Fratter
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

000004

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A18-229-818 - BRADENTON Date: MAY 16 2003

In re: SEBASTIAN-SOLER, DAVID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Soto, Eduardo, P.A.

ON BEHALF OF DHS: GRIM, JAMES, A.D.C.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

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(APPENDIX E)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Bradenton, Florida

File A 18 229 818 January 8, 2003
In the Matter of
DAVID SEBASTIAN-SOLER,
IN REMOVAL PROCEEDINGS -
Respondent
CHARGE:
Section 237(a) (2) (A) (iii) of the Immigration and Nationality Act as amended – anytime after admission you've been convicted of an aggravated felony as defined in Section 101(a)(43)(U) of the Immigration and Nationality Act.
APPLICATIONS:
Application for Citizenship and Application for relief under the Convention Against Torture.
ON BEHALF OF RESPONDENT:
Eduardo Soto, Esquire
Suite 940, 999 Ponce De Leon Blvd.
Coral Gables, Florida 33134
ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY: John W. Seaman, Jr. Esquire, James Grim, Esquire INS Trial Attorney
Bradenton, Florida

ORAL DECISION OF THE IMMIGRATION JUDGE

1. STATEMENTS OF FACTS

The respondent is a native and citizen of Cuba, he was born on 22 July 1966 and paroled into this country in 1969. The Respondent is charged pursuant to a Notice to Appear Exhibit number 1 with not being a citizen of the United States but a native and citizen of Cuba who was paroled into this country 3 February '69 and then was convicted in 16 May 1997 in federal court with the offense of conspiracy to transport,

llg

receive and sell stolen property in interstate foreign commerce in violation of Title 18 United States Code Section 371 and transportation of stolen goods in interstate commerce, six counts in violation of Title 18 United States Code Section 2314 for which he was sentenced to a term of imprisonment of 60 months as to count 1 and a term of 77 months as counts 2, 3, 4, 5, 6, 7 all to be served concurrently.

The respondent appeared at a hearing conducted on 22 November the year 2002 admitted allegations 1 through 5, denied the allegation of the charge of removability and the following Exhibits were admitted into evidence. Exhibit number 1, is the Notice to Appear, Exhibit number 2, is the 1-213, Exhibit number 3, is the Judgment and conviction, Exhibit number 4 is a packet of materials submitted by the respondent and Exhibit number 5 is the naturalization petition recommendation be denied and documents to be submitted by the respondent.

The question of citizenship was discussed in a written order issued by the Judge on 22 November 2002. And that written order is made a part of this record and incorporated into this decision. The removability was established, the respondent had indeed been convicted as charged as shown by Exhibits 1, 2, and 3.

And the respondent was determined to be an aggravated felon, he had served over 5 years. Accordingly, he was not eligible for political asylum or withholding of deportation, but he did appear to be eligible for a possibility for relief under the Convention

llg

Against Torture. The respondent was given an opportunity to file his application for relief and the respondent and counsel decided that they did not want to proceed along that route. And the respondent is adamant in the fact that he is a United States citizen. But as I state the Court has concluded otherwise and see my decision of 22 November 2002.

I find that respondent is not eligible for any type of relief and accordingly I must order that the respondent be removed and deported from this country back to his native country of Cuba.

R. KEVIN McHUGH
Immigration Judge

(APPENDIX F)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Bradenton, Florida

File: A# 18 229 818
In the Matter of
SEBASTIAN-SOLER, DAVID
IN REMOVAL PROCEEDINGS
Respondent Date: November 22, 2002
APPLICATIONS:
Motion to Terminate; Motion to Reconsider
ON BEHALF OF RESPONDENT:
Lourde Guiribitey, Esq.
999 Ponce De Leon Blvd.
Suite 940
Coral Gables, Florida 33134
ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY: John W. Seaman, Jr. Esquire, James Grim, Esquire INS Trial Attorney
Bradenton, Florida

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Statement of the Case

Respondent was born in Cuba on July 22, 1966. He was paroled into the United States at or near Miami, Florida in 1969. In 1974, Respondent's status was adjusted to that of lawful permanent resident. By Notice to Appear ("NTA" dated September 23, 2002, the Immigration and Naturalization Service ("Service") charged the Respondent with removability pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), as an alien who at any time after admission has been convicted of an aggravated felony as defined in section 101(a)(43)(K) of the Act. See Exhibit 1. Such charge was based on the Respondent's conviction, on May 16, 1997, of conspiracy to transport, receive, and sell stolen goods in interstate and foreign commerce in violation of 18 U.S.C. § 371, and transportation of stolen goods in interstate commerce in violation of 18 U.S.C. §2314. See Exhibits 1 and 3.

Respondent filed a petition for naturalization with the U.S. District Court, Southern District of Florida, on March 11, 1988. See Exhibit 4. Respondent was scheduled for a final hearing on his petition for naturalization on July 11,1991. Respondent did not appear for such hearing. Another hearing date was scheduled for February 19, 1993; again, Respondent failed to attend such hearing. See Exhibit 4. On December 8, 1993, a federal court judge denied Respondent's petition for naturalization due to lack of prosecution. See Exhibit 4. On August 6, 2002, a U.S. District Judge dismissed, with prejudice, Respondent's motions to reconsider the denial of his application for naturalization and denied all pending motions as moot See Exhibit 4.

Respondent now argues that he is not an alien as defined in section 101 (a)(3) of the Act. Respondent contends that an oath taken by him at an examination to petition for naturalization on March 11, 1988, constituted an oath of allegiance to the U.S. which rendered him a citizen of the U.S., or in the alternative, a national of the U.S. See INA § 101(a)(22). Respondent has also requested that this Court Issue a subpoena to compel the production of Respondent's petition for naturalization, Form N-405, on which Respondent claims he signed the aforementioned oath.

II. Discussion

A. Citizenship

Respondent argues that the completion of his preliminary examination for naturalization, and the filing of his petition for naturalization, constituted his admission to citizenship. Section 335 of the Act, as it was in effect in 1988, required that an applicant for naturalization be subject to a preliminary investigation before proceeding to a final hearing on a petition for naturalization. Section 336(a) of the Act required that

every final hearing upon a petition for naturalization be had in open court before a judge or judges thereof. . . and upon such final hearing of such petition the petitioner, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court." Section 336(b) of the Act provided an exception to the requirement that the petitioner be examined before and in the presence of the court if the preliminary examination was conducted by the proper person. Such provision did not eliminate the "open court" requirement of section 336(a) of the Act, as Respondent contends; rather, this provision provides that the examination of an applicant for naturalization need not be performed by a court if the preliminary examination was properly conducted. Thus, although Respondent's preliminary examination was properly conducted, and there may have been no need for an *examination* of Respondent before the Court, the final step of being sworn in remained to be done.

Respondent's petition for naturalization was not approved at the time of the preliminary examination. Respondent's case was reviewed and continued pending the receipt of additional information. This refutes Respondent's contention that he became a U.S. citizen at the conclusion of the preliminary examination.[1] Therefore, Respondent is not a citizen of the U.S. because his naturalization proceeding was merely in its preliminary stages: there was no recommendation that his petition be granted. [2] Respondent never appeared before the court to complete the naturalization process, and his application was dismissed for lack of prosecution in 1993.

The Court also notes that the Code of Federal Regulations, both in 1988 and 2002, specifically provided that petitions deemed abandoned by the petitioner (i.e. Respondent) will be dismissed for lack of prosecution. 8 C.F.R. § 334.18(b) (1988);8 C.F.R. 337.10 (2002). If this Court were to follow Respondent's argument, all persons who undertake the preliminary steps to naturalize, but who have not taken the final steps necessary to become citizens, would be citizens of the U.S. by default. Such a situation would render the aforementioned provisions of the Code meaningless: there would be no purpose in providing for the dismissal of applications for naturalization on the basis of lack of prosecution if a petitioner were able to acquire citizenship at any stage in the naturalization process.

B. Nationality

Section 101 (a)(3) of the Act defines an alien as any person who is not a citizen or national of the U.S. Section 1 0l(a)(22! of the Act defines a national of the U.S. as either 1) a citizen of the U.S., or 2) a non-citizen of the U.S. who owes permanent allegiance to the U.S. ("Matter of Tuitasi, 15 I&N Dec. 102 (BIA 1974), the respondent, who had no claim to U.S. citizenship

or nationality by birth or parentage, maintained that she was a national of the U.S. under section 101(a)(22) of the Act because she owed permanent allegiance to the U.S. The Board stated: "The acquisition of nationality for a noncitizen national . . . is not governed by section 101(a)(22); it is

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[1] The1990 amendments to the immigration laws removed naturalization proceedings from the judicial to the administrative context. . The Second Circuit Court of Appeals, in a case arising before such amendments were implemented, compared the role of an examiner in the naturalization process with that of an officer in deportation proceedings. Tieri v. INS, 457 F.2d 391 (2nd Cir. 1972). That Court stated that "the preliminary examination is not intended to culminate in a determination on the merits at the final hearing . . . las opposed to deportation proceedings in which the presiding officer does make a determination on the merits. Id. at 392.

[2] The Court acknowledges that Respondent's petition was approved several years after his examination. However, this only supports the conclusion that at the time of the examination, even if Respondent had signed an oath of allegiance to the United Sates, the naturalization process was not completed at the time.

governed instead by section 308 . . . .[6] Upon finding that the respondent was not a U.S. national.. the Board of Immigration Appeals ("Board") stated:

> Except for the acquisition of nationality in conjunction with the acquisition of citizenship. the Act provides *no other means* by which the respondent could have acquired United States nationality. Congress has established rigorous procedures which govern the acquisition of both lawful permanent resident status and United States citizenship for aliens. Nationality has attributes akin to each of these . . . *We cannot accept the respondent's unstated. but underlying. assumption that Congress would permit an alien to acquire United States nationality merely by asserting an allegiance to the United States.* (Emphasis supplied).

Tuitasi, Supra. at 103-104.

Tuitasi stands for the proposition that the only way to acquire U.S. nationality is through the provisions specifically provided for in the Act. The Act currently provides lists of persons deemed to be nationals of the U.S. INA §§ 301,308 (2002). Respondent does not qualify for nationality under either of these provisions. and the Act provides no other method for acquiring U.S. nationality. Further. this Court finds that the Board's statement that mere assertion of allegiance to the U.S. does not confer nationality upon an individual is determinative in the instant case. Even if Respondent had signed an oath swearing allegiance to the U.S. during his naturalization proceedings. such would not operate to confer U.S. nationality upon him.

Neither the Board nor the Eleventh Circuit have examined the issue of whether the filing of a petition for

naturalization confers any sort of status upon the applicant. Several cases from other Circuits indicate that the filing of an application for naturalization may confer certain rights upon the applicant. See Shomberg v. U.S., 348 U.S. 540 (1955); U.S. v. Menasche, 348 U.S. 528 (1955) (provision providing for nonretroactive application of changes in law protects those whose naturalization process was in pre-petition stage when law changed). Other cases provide that while long residence in the U.S. is not sufficient to confer the status of "national upon a person, long residence coupled with an application for naturalization are evidence of owing allegiance to the U.S. in a manner that comports with INA §101(a)(22). U.S. v. Morin, 80 F.3d 124 (4111 Cir. 1996) (dicta in case pertaining to sentence enhancement); Hughes v. Ashcroft, 255 F.3d 752 (9th Cir. 2001) (must apply for citizenship to be national of the U.S.); Sierra-Reyes v. U.S., 585 F.2d 762 (5th Cir. 1978) (long residence absent application for naturalization does not confer nationality).

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[4] Section 308 of the Act specifies which persons are nationals, but not citizens, of the U.S. at birth. INA § 308 (1988).

Although these cases indicate that the filing of a petition for naturalization is evidence of national status, they do not provide that U.S. nationality is immediately conferred upon an individual who has reached a certain point in the process of applying for naturalization. See Hughes, supra at 757 (application for U.S. citizenship is merely "minimal" requirement in demonstrating nationality).

Further, there is no indication in the Act, the Code of Federal Regulations, or binding case law that filing a petition for naturalization and signing an oath preliminary to that which is to be administered in open court upon the approval of such petition, operates to confer U.S. nationality upon a petitioner. There is no provision or binding authority to buttress the conclusion that completing a petition for naturalization, where there is still a possibility that such application may be denied, confers upon the applicant the benefit of insulation from the immigration laws of this country. This Court finds that the nature of Respondent's naturalization proceedings (i.e. more needed to be done, the petition had yet to be approved or denied) were too preliminary in nature to have conferred upon Respondent any status, much less that of a national of the U.S.

C. Subpoena

An immigration Judge has exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses and/or the production of documentary evidence. 8 C.F.R § 3.35(b)(1). A party seeking a subpoena must, before such subpoena is issued, state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show that he or she has made diligent effort, without success, to produce such evidence. 8 C.F.R. § 3.35(b)(2). If the Immigration Judge determines that 1) a witness will not appear and testify or produce documentary evidence, and 2) the evidence is essential, the Immigration Judge shall issue a subpoena. 8 C.F.R. § 3.35(b)(3).

In the instant case, the Court finds that the evidence sought to be produced is not essential. The evidence sought by the Respondent, a document purporting to show that Respondent signed an oath of allegiance to the U.S., would not establish that Respondent is either a citizen or national of the U.S. because the mere assertion of allegiance to the U.S., even under oath, does not confer such status upon the petitioner. See Tuitasi, supra.

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ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Terminate removal proceedings be DENIED.

IT IS HREBY FURTHER ORDERED that Respondent's Motion to Reconsider Denial of Request for Issuance of Subpoena be DENIED.

DATED this 22 day of November, 2002.

(signed)
Honorable R. Kevin McHugh
U.S. Immigration Judge

6 000340

"APPENDIX G"

PETITION FOR NATURALIZATION

U.S. Department of Justice
Immigration and Naturalization Service
ORIGINAL (To be retained by Clerk of Court)
Petition No. *239153* A.R. No. A18 229 818
To the Honorable JUDGES, DISTRICT Court for the
SOUTHERN DISTRICT at MIAMI, FL
This petition for naturalization, hereby made and filed under section 316, *Immigration and Nationality Act, respectfully shows:*

(1) My full, true, and correct name is ____
DAVID SEBASTIAN
(Full, true name, without abbreviations)

(2) My present place of residence is
1370 W. 77 ST
~~750 W. 23RD Street~~ ~~HIALEAH~~
(Apt. No.) *(Number and Street)* *(City or Town)*
DADE FLORIDA ~~33010~~ 33014
(County) *(State)* *(Zip Code)*

(3) I was born on 7 / 22 / 66 . CUBA
(4) I request that my name be changed to NONE
(5) I was lawfully admitted to the United States for permanent residence and have not abandoned such residence.
(6) [If petition filed under Section 316(a).] I have resided continuously in the United States for at least five years and continuously in the States in which this petition is made for at least six months, immediately preceding the date of this petition and after my lawful admission for permanent reisdence [sic], and I have been physically present in the United States for at least one-half of such five year period.

[cont' next page]

[cont']

(7) [If petition filed under Section 319(a).] I have resided continuously in the United States in marital union with my present spouse for at least three years immediately preceding the date of this petition, and after my lawful admission for permanent residence, during all of which period my said spouse has been a United States citizen, and have been physically present in the United States at least one-half of such three-year period. I have resided continuously in the States in which this petition is made at least six months immediately preceding the date of this petition.

(8) [If petition filed under Section 319(b).] My present spouse is a citizen of the United States, in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or subsidiary thereof, or of a public international organization in which the United States participates by treaty or statute, or is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States, or is engaged solely as a missionary by a religious denomination or by an interdenominational mission organization have a bona fide organization within the United States, and such spouse is regularly stationed abroad in such employment. I intend in good faith upon naturalization to live abroad with my spouse and to resume my residence within the United States immediately upon termination of such employment abroad.

[cont' next page]

[cont']

(9) [If petition filed under Section 328.] I have served honorably in the Armed Forces of the United States for a period or periods aggregating three years. I have never been separated from the Armed Forces of the United States under other than honorable conditions. If not still in service, my service terminated within six months of the filing of my petition.

(10) [If petition filed under Section 329.] While an alien or noncitizen national of the United States, I served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25,1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending October 15, 1978, or I was discharged after five years of service under the Act of June 30, 1950 [P.L. 597, 81st Congress]. If separated from such service, I was separated under honorable conditions. At the time of enlistment, reenlistment, or induction I was in the United States, the Canal Zone, American Samoa, or Swains Island. If not in any of these places, I was lawfully admitted to the United States for permanent residence subsequent to enlistment or induction. I was never separated from such service on account of alienage. I was not a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform. I have not previously been naturalized on the basis of the same period of service.

[cont' next page]

[cont']

(11) I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

(12) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

(13) It is my intention in good faith to become a citizen of the United States and take without qualification the oath of renunciation and allegiance prescribed by the Immigration and Nationality Act, and to reside permanently in the United States. I am willing, when required by law, to bear arms on behalf of the United States, to perform noncombatant service in the Armed Forces of the United States, and to perform work of national importance under civilian director [unless exempted therefrom].

(14) I am able to read, write, and speak the English language [unless exempted therefrom], and I have a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States.

(15) Wherefore I request that I may be admitted a citizen of the United States of America. I swear [affirm] that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name. So help me God.

[cont' next page]

[cont']

(16) ("Sebastian-Soler's Signature")
(Full Name, Without Abbreviations)

When Oath Administered by Clerk or Deputy Clerk of Court

Subscribed and sworn to (affirmed) before me by above-named petitioner in the respective forms of oath shown in said petition and affidavit, and filed by said petitioner, in the office of the clerk of said court at _____

this _____ day of _____, 19__

_____
Clerk.

_____
Deputy Clerk.

(SEAL) [16]

When Oath Administered by Designated Examiner

Subscribed and sworn to (affirmed) before me by above-name (sic) petitioner in the respective forms of oath shown in said petition and affidavit at MIAMI, FL. this 11TH day of MARCH, 19 88

("signed by M[ervl]. Latinsky")
Designated Examiner

I HEREBY CERTIFY that the foregoing petition for naturalization was by petitioner named herein filed in the office of the clerk of said court at MIAMI, FL. this 11th day of MARCH 19 88

ROBERT M. MARCH
Clerk.

("initialed by the deputy clerk of court")
Deputy Clerk.

Form N-405 (Rev. 06/03/87) Y [cont' next page]

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[16] The foregoing portion of the petition for naturalization was intentionally left blank when a designated examiner conducted the examination. See 8 C.F.R. §339.1 (1988) ["The clerk shall receive and file petitions and administer the required oath or affirmation to each petitioner *unless such petitioner has executed the petition before a designated examiner.*" (emphasis added)]

("Continuation / Reverse Side of Petition for Naturalization #239153 Containing Affidavit of Renunciation and Allegiance")

OATH OF ALLEGIANCE

I HEREBY DECLARE, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

~~that I will bear arms on behalf of the United States when required by the law~~; (Petitioner's initials)

~~that I will perform noncombatant service in the Armed Forces of the United States when required by the law~~; (Petitioner's initials)

that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; SO HELP ME GOD. In acknowledgement whereof I have hereunto affixed my signature.

("Sebastian-Soler's signature")

(Signature of Petitioner)

NOTE – In renunciation of title of order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or titles) which I have heretofore held," or "I further renounce the order of nobility) to which I have heretofore belonged."

Petition granted Certificate No. _____ issued.
Petition denied: List No. _____
Oath of allegiance waived: List No. _____

"APPENDIX H"

Text of Constitutional and Statutory Provisions Involved

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Title 8 U.S.C. §1252(b)(5) provides:

> Treatment of nationality claims
>
> (A) Court determination if no issue of fact
>
> If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.
>
> (B) Transfer if issue of fact
>
> If the petitioner claims to be a national of the United States and the court of appeals finds that a *genuine issue* of *material fact* about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28. (emphasis added).

(C) Limitation on determination

> The petitioner may have such nationality claim decided only as provided in this paragraph.

Section 408 of Pub.L. 101-649, as amended Pub. L. 102-232, Title III, § 305 (n), Dec. 12, 1991, 105 Stat. 1750, titled "*Continuation of current rules* (a)(2)(A)" provides in relevant part:

> "[A]ny petition for naturalization which may be pending in a court on October 1, 1991, shall be heard and determined in accordance with the requirements of law in effect when the petition was filed. [19]

Title 8 U.S.C. §1421(e) (March 11, 1988 Ed.) provides in relevant part:

> ... any petition for naturalization filed on or after September 26, 1961, *shall be heard and determined in accordance with the requirements of this subchapter.* (emphasis added)

Title 8 U.S.C. §1446(b) (1988) provides in relevant part:

> The Attorney General shall designate employees of the Service to conduct

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[19] Sebastian-Soler's judicial petition for naturalization was filed on March 11, 1988.

> preliminary examinations upon petition for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes *any such employee so designated is authorized* to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner *for naturalization.* (emphasis added).

8 U.S.C. §1447(a) (1988) provides:

> Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner, except as provided in subsection (b) of this section, *shall be examined under oath before the court and in the presence of the court.* 8 U.S.C. §1447(a) (1981 Ed.) (emphasis added)

Title 8 U.S.C. §1447(b) (1988) provides in relevant part:

> The requirement of subsection (a) of this section for the examination of the petitioner under oath before the court and in the presence of the court shall not apply in any case where an employee designated under section 1446(b) of this title has conducted the preliminary examination authorized by section 1446(b) of this title; except that the court may, and shall upon the demand of the petitioner, require examination of the

> petitioner under oath before the court and in the presence of the court. (emphasis added)

8 U.S.C. §1448 titled "Oath of renunciation and allegiance" provides:

> (a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, *take in open court an oath* (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an ~~oath~~ containing the substance of clauses (1) to (5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1) to (4) and clauses (5) (B) and 5 (C) of this subsection, *and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court*

> *that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1) to (4) and clause (5) (C).* The term "religious training and belief" as used in this section shall mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. (emphasis added).

Title 8 U.S.C. §1449 (1988) provides in relevant part:

> A person *admitted to citizenship* by a naturalization court in conformity with the provisions of this subchapter *shall be* entitled *upon such admission* to receive from the clerk of such court a certificate of naturalization ..." (emphasis added)

Title 8 U.S.C. §1450(b) (1988) provides in part:

> It shall be the duty of the clerk of each and every naturalization court to issue to any person *admitted by such court to citizenship* a certificate of naturalization. (emphasis added).